UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MANI JACOB, ET AL.,

Plaintiffs,

v. 11 CV 160 (JPO)

DUANE READE, INC., ET AL.,

Defendants.

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New York, N.Y.
July 9, 2013
11:10 a.m.

Before:

HON. J. PAUL OETKEN

District Judge

APPEARANCES

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STEPHEN A. FUCHS

(In open court; case called)

THE COURT: Good morning everyone.

We're starting with the Jacob against Duane Reade case. And I believe I had actually scheduled oral argument in both this case and the Right Aid case because there are some overlapping similar issues. I'm not clear exactly to what extent they will be decided on the same issues or not, but I thought it was helpful to do them essentially back-to-back.

So we'll start with the Jacob case. And what's before me is a motion for reconsideration of my class certification ruling in the case which relates to assistant store managers at the Duane Reade stores.

So I'll hear first from the movant, Mr. Benson.

MR. BENSON: Yes, your Honor.

THE COURT: And what I'd like you to -- I mean you can cover whatever you'd like. What I'd like you to focus on I guess is the issue of -- well, what you raise in the motion primarily is the issue of Comcast, the Comcast decision. And whatever points you'd like to emphasize about that.

The question I have in my mind is -- and this is something that presumably is being worked out in certainly district courts and maybe to some extent courts of appeals -- is to what extent does the Comcast decision represent a ruling, first of all, that applies outside the antitrust context and then beyond that, is it a ruling that -- that damages, if

they're not capable of measurement on a class-wide basis, automatically in every -- and every case that is sought to be certified under Rule 23 necessarily fails the predominance inquiry going forward.

So I want you to focus on those issues and then any other issues that you focused on for reconsideration.

MR. BENSON: Okay. Would you like me to stay at counsel table or the lecturn?

THE COURT: Whatever you're more comfortable with, as long as the court reporter can hear you. At counsel table is fine.

MR. BENSON: I have a very loud voice. You won't have a problem hearing me.

Good morning and appreciate the opportunity to orally argue before you. We do recognize that this is a motion for reconsideration. And while it should come as no surprise that we respectfully disagreed with your Honor's decision, we understand that this is not a situation where we can just ask you to change a decision for no other reason than we disagree. We made this motion because we believe that since that decision the law has been clarified in two separate but equally important ways, one of which involves Comcast, as I'll get into, and another involves the Supreme Court's decision in Dukes. And the principles set forth in that important decision, it is now clear, do in fact apply in the wage-an-hour

context.

And secondly, as I said, in the Comcast decision, the Supreme Court clarified the applicable standard to be utilized in the 23(b)(3) predominance analysis. Specifically, it established that an analysis of the damages model, whether individual damages calculations are necessary is a crucial factor in the analysis.

Taken together, we believe that these decisions and several decisions that have been issued since establish that a changed landscape, a landscape where class action treatment is only appropriate in the limited situations where there exists common types of proof and damage calculations that do not require individual assessments.

And it is clear that this case does not fall into that limited category.

THE COURT: Would there be any wage-an-hour cases that would survive under that analysis? In the end, don't they essentially all require individualized analysis, even if there's a single method of calculation? Or don't they all involve individual analyses insofar as the individual employees would have worked different hours day by day?

MR. BENSON: In the end of the day, it's more a fairness and a due process issue. And there are many situations where damage calculations could be objectively ascertained. For example, if a company doesn't pay spread of

hours under New York law which requires an additional hour of pay after ten hours and they just didn't do it and you could ascertain who worked ten hours, who worked more than ten hours and just apply a damage calculation.

But the difference here -- and in certain types of wage-an-hour cases, the difference here is that there are two very important components of the damages here that do, in fact, require that individual analysis and specifically would deprive Duane Reade in this case of its right to defend itself with respect to that. And that's because here the measure of damages is in the number of hours that each individual -- assuming that they were successful on liability, the number of hours that each individual worked on a daily basis and then a weekly basis to determine whether, in fact, that they worked over 40 and would be eligible for any overtime.

And then more importantly -- because again -- and there is no way around looking at each individual, determining what the proofs are with respect to that individual, did they work over 40 and how many hours over 40 every week for the entire period for each individual. There is no way around doing that analysis. Otherwise, you're going to deprive Duane Reade of its right. Because -- and this is also important. There is no way -- there is no common aspect. In other words, all assistant store managers don't work the same number of hours every week. If, for example, they did, then it would be

easier, but they don't. And there's no proof that they do.

In fact, if you look at the footnote in the reply papers of plaintiff, they list an exhaustive list of differences -- I believe it's footnote 4 -- no, it's not. Just bear with me one second, your Honor. Because I think this is important.

It's footnote six.

THE COURT: Of the opposition.

MR. BENSON: Of the opposition.

I'm sorry. I think it's -- isn't it footnote --

MR. FUCHS: It's their footnote six of their opposition.

THE COURT: Yes. It's the very long footnote.

MR. BENSON: So we counter. And there are 27 iterations, even in that footnote, of different hours that supposedly were worked by -- taking the plaintiffs' deposition testimony.

THE COURT: No, clearly there are different hours.

MR. BENSON: Different hours.

THE COURT: My question is: Is there a system by which each of them kept track of when they came in and when they left?

MR. BENSON: There were time -- there were punched time records.

THE COURT: So for every employee there's time

records.

MR. BENSON: Not every employee. But for the -- there should be time records for, in most cases.

But even time records aren't necessarily accurate. There was a decision that the Seventh Circuit just issued in this case. Farmer v. DirectSat. I don't have any Westlaw site. It's 08 CV 3962. Where even in that case the Seventh Circuit determined that when you're talking about trying to determine the number of hours, and that case was off-the-clock, that even looking at a time clock isn't necessarily reliable because it doesn't mean that they were working during all those hours. They could have been not working for a half-hour or a certain amount of time.

THE COURT: But here's my question. Assume that there were an accurate method, doesn't that meet what the Supreme Court was talking about when they said having sort of a single method of calculating damages?

MR. BENSON: Well, again, it's going to be ultimately a matter of degree. And where I -- as I said, there's completely objective, easily ascertainable proof, I would say yes, you wouldn't necessarily need individual testimony. But it's the second component of the damages analysis where, again, there is no way around that here, and that is with respect to what type of relief they would be entitled to, whether it's half-time, whether it's time-and-a-half. The issue of what was

the arrangement between Duane Reade and each individual manager.

And there is varying testimony. The law is clear that if it was the intent of the parties that their salary covered all hours that they worked -- and that's our position -- if it was the intent of the parties, then each week you divide the number of hours that they worked into their salary. You get a rate and then they're entitled to half-time.

Plaintiffs don't take that position at all. They take the position to the contrary. They claim that they're entitled to time-and-a-half after 40 hours.

There's also a third possible position here. And that is that there was some expectation that the salary covered X number of hours, for example, 55 or 60, and that you'd be entitled to half-time for those number of hours. And then an additional time-and-a-half beyond that.

THE COURT: Isn't there some dispute as to whether the whole fluctuating work week method applies in misclassification cases?

MR. BENSON: There is no dispute. It's ultimately a question of fact on an individual basis as to what the arrangement is. There is no way to ascertain on a class-wide basis -- unless plaintiffs were adopting the position that it was clear and undisputed that all plaintiffs were compensated on the fluctuant work week method and that that was understood,

you would not need an individual issue. You know you have to do an individual analysis. There is no way around that.

And we know from the deposition testimony that, the testimony, the proof in the record is widely varied with respect to the individuals who were questioned about this. Some said after 40 hours I expected overtime. Some said 55 hours. Some said all hours worked. It's all over the lot.

THE COURT: And they had different arrangements -- I assume they didn't have employment contracts, they had various oral arrangements or --

MR. BENSON: Well, it varied. In some cases there are written statements where they acknowledge that it's for all hours worked. Even in those situations their testimony was: I signed that but I didn't know what it was. I was forced to. I didn't read it. I was told I had no choice.

So -- but that's not all the cases. That's not everybody. Some have signed. Some haven't.

The point is it's different for everybody. And this is a big deal. This is a difference of potentially 300 percent on an individual-by-individual basis when it comes to ultimately what damages are appropriate.

And this is exactly the type of situation that the Court said we need to look at and determine whether or not, that if we certify a class, we'll have to do that.

And, again, if Comcast applies -- and we think it

clearly does -- there is no way around the determination that ultimately in this case in order for Duane Reade to be given its due rights, we need the ability to assess on an individual-by-individual basis what that was.

If they say that the arrangement was different from either what they signed or what we believe the arrangement is, we should be entitled to test that.

And that can't be done on a class-wide basis.

THE COURT: What's the status of discovery? Has there been only class discovery -- class cert discovery in this case or has there been general liability discovery?

MR. BENSON: Basically only at this point class-wide discovery. There has been no real -- although we have as part of that in certain cases inquired into, you know, for example, on the issue of what was the intention of the parties with respect to the fluctuating work week issue. The limited number of individuals who have been deposed have provided testimony with respect to that very important point. That's why we're able to make it, because the results were so varying and different.

THE COURT: Okay. Thank you.

Is there anything else?

MR. BENSON: I'll reserve.

THE COURT: Mr. Klein.

MR. KLEIN: Good morning, your Honor.

Let me just address a couple points and I will try to be brief.

In the Comcast decision itself, Justice Ginsburg in the dissent states that the opinion, Comcast opinion breaks no new ground on the standard for certifying class action on Rule 23(b)(3). She writes in particular, "The decision should not be read to require as a prerequisite to certification that damages attributable to a class-wide injury be measurable on a class-wide basis."

That's further afield than what we have in this case. In this case, we have an employer who has a statutory obligation to maintain accurate and reliable time records of hours worked and payments received for each work week for each employee.

They claim, on one hand, that they have records. But on the other hand say that we're not sure they're reliable.

THE COURT: Do they have an obligation to maintain them if they're exempt?

MR. KLEIN: Well, that's the issue. If they're misclassified if, in fact, they were nonexempt --

THE COURT: But if they were, in fact, exempt, then there is no obligation?

MR. KLEIN: That is true.

But the record keeping requirements are very explicit on that.

THE COURT: But they apply to people who turn out to be nonexempt?

MR. KLEIN: That's right. Yes.

In other words, if the employees are determined to have an entitlement to overtime, then the employer had a concomitant duty to maintain accurate time records under both the Fair Labor Standards Act and New York labor law.

The other point is that this question of Comcast and the implication or impact, your original question to Mr. Benson in the wage-an-hour context is quite clear. We cite to a case on the Ninth Circuit that just came down, Leyva v. Medline. And in Leyva, the Ninth Circuit explains quite clearly why Comcast would not apply when the question in the case relates to whether individualized damages would defeat Rule 23(b)(3) predominance or superiority. In the Ninth Circuit's decision in Medline, they basically explain what Justice Ginsburg said in her dissent in Comcast, that there's really no application of the Comcast decision which related to trying to tie a particular theory of causation to the economic harm of the class distinct from a case where, as a consequence of a misclassification decision or decision on liability, damages automatically flow and the only question is what does each individual class member receive.

THE COURT: But in the Leyva case, L-E-Y-V-A Medline --

MR. KLEIN: Right.

THE COURT: The Court says that the plaintiffs could present a "computerized payroll and timekeeping database."

Does that exist here?

MR. KLEIN: It does. Mr. Benson says, and we agree, that there are punch records. We could supplement those records with additional testimony from class members. There's a plethora of evidence that's available. We haven't discovered that yet. That isn't part of the first stage liability determination. That's certainly one of the options.

Another option is a special master. Individualized issues may arise or not. We're not sure.

The irony, of course, your Honor, is the defendant on the one hand says they didn't misclassify assistant store managers, meaning we never get to the damages phase of this case; but on the other hand say we can't certify class because there are individualized issues relating to damages. It's one or the other. They can't argue both points simultaneously. And that's essentially what they're trying to do here.

Just to your point before, your Honor. This is an issue that comes up in every single last wage-an-hour case, what each individual class member is entitled to in terms of hours worked. And it would just essentially put this area of practice on its ear if the Comcast decision means not certifying a class because there are individualized differences

in terms of damages in a case where the employer had the obligation to maintain accurate records.

THE COURT: The one thing I'll ask you about that is it does seem -- it would be surprising, I would think, if the Supreme Court in an antitrust decision wrote something about Rule 23 that's so broad that it would effectively eliminate all wage-an-hour class-wide litigation. But at the same time Justice Scalia says in response to Ginsburg's dissent, you know, I don't know why the dissent is talking about antitrust law. This is a straightforward case about Rule 23. And then he says respondent's model falls short of establishing that damages are capable of measurement on a class-wide basis. And if that means there has to be kind of one unitary overarching way of measuring damages, then maybe that's what they did.

MR. KLEIN: So on that point, your Honor, this is a critical distinction between antitrust and every other area of law, particularly wage an hour. In antitrust and in Comcast in particular, the plaintiffs asserted that there were four different theories of causation and that the expert could not identify the amount of damages attributable to the accepted theory of causation. They didn't know and couldn't have known or come up with a damages model.

It isn't a question of individualized differences. It's a question of: Is the class or any part of the class entitled to a dollar, a million dollars, or a hundred million

dollars? They couldn't answer that question. That's a far cry from a case where it's obvious that there's a causal relationship between misclassification and liability grounds and entitlement to damages. The only issue remaining in a case like this is well so worker A gets five thousand dollars and worker B gets six thousand dollars. That's a different question.

THE COURT: Let me just ask another question about, which I asked Mr. Benson.

The discovery that's happened in this case so far has essentially been class discovery? It hasn't been liability discovery?

MR. KLEIN: Essentially liability discovery. We have not done individualized or damages phase discovery.

THE COURT: Okay. What about the idea of bifurcating -- I think there are a couple of district courts out there that have addressed this Comcast issue by saying -- they've done it a couple of different ways. One is the Ninth Circuit's approach. But it seems like there are one or two that have said well we can bifurcate, you know, liability is different from damages; and if there's an issue under Comcast, it would only affect the damages inquiry. What do you think of that idea of a bifurcation?

MR. KLEIN: There are a couple good examples of that being done. We have cases from the Department of Corrections

in the State of Connecticut where our judge in that case essentially created an issues liability class under Rule 23(c)(4), certified the liability issue under (b)(2)(C)(4). And then in a stage two process, certified some issues under (b)(3) and others for individualized assessment. That's a Title VII case. It's an example where that's a very useful way to resolve some of these individualized issues that may arise or not.

My suggestion to the Court, your Honor, is let's see if there's a liability determination. If there is, then there are lots of ways to manage those issues. We can brief it. It may make sense to certify an issues class on damages for some part or all of the case. But we're not there yet. We haven't had discovery on that. The Vulcan Society case is another example where that was done. Judge Garaufis certified some phases or pieces of the damages phase of the Vulcan Society case under (b)(3), and left other pieces for individualized assessment. So those are trial manageability tools that the rule provides your Honor. And I think that would be an alternative way to resolve this.

I'm not sure there's a right or wrong answer to this.

I think at this stage in the case before liability grant, before discovery on damages, I'm not sure there is an obvious solution one way or the other.

THE COURT: Okay. Thank you.

MR. BENSON: May I be heard, your Honor?

THE COURT: Yes.

MR. BENSON: And what Mr. Klein just described is exactly what the Court rejected in Comcast. In other words, that was the understanding in this circuit and in many circuits prior to that decision was to do exactly what he suggested; that there was a total difference between damages and liability and let's put off that decision until we've established liability. Let's grant class certification and let's deal with that issue of individual damages later.

The Court said no in Comcast. That's what the holding says.

THE COURT: No. I think you're right, that Comcast, and even what the Second Circuit did in the Cuevas case, I think there's some tightening of what a district court needs to do at the class certification stage. There has to be a more rigorous analysis of all the requirements.

But I think Mr. Klein makes a good point about how in that case the damages theory and the liability theory were just completely apples and oranges. They just didn't map up at all. And so the Court found it fairly easy to reject on predominance grounds the idea of any damages in that case.

But in this case there is kind of a straightforward methodological approach to calculating damages even if it's different numbers person by person, no?

MR. BENSON: No. Not given the issue of the modicum of damages and whether it's going to be half-time, whether it's going to be time-and-a-half, or whether it's going to be some hybrid of both.

And think that the distinction that your Honor raises between Comcast and the instant case is not necessarily controlling because even though in that case, yes, there was a disconnect between the theory of liability and the damages, in the end of the day what that led to was the need for individualized inquiries when it came to damages. And ultimately that's important in the predominance analysis because it's math. It's math. Right. The predominance analysis is math.

It's do these individual issues predominate over class issues? Is this a situation where we can take representative proof, individual testimony and say that's imputed to the whole class? Or is it not? Or do we need -- or do individual issues predominate?

So while that's a distinction in the Comcast case from a factual standpoint, from the predominance analysis standpoint, that is not a distinction. And it's clear that that's not a distinction because the Supreme Court after Comcast, in the RBS case, which is a wage-an-hour classification case, reversed and remanded and said do an analysis in light of Comcast. They are telling us that you

need to do this in the wage-an-hour context.

THE COURT: Well there's a lot of scholarship on what a GVR by the Supreme Court means. I think what it means is we want the courts of appeals to take a look at this in the first instance and at some point in a few years we'll take up the issue of how far we meant this to go.

MR. BENSON: Your colleague Judge Baer in the Wang v. Hearst case.

THE COURT: Right. I saw that.

MR. BENSON: Involving my esteemed counsel, opposing counsel, rejected the notion that they're espousing here. And we think rightfully and clearly so. He says there is GVRs and then there is GVRs.

THE COURT: And what did he do as a result of that? I forget.

MR. BENSON: He denied class -- he basically said here there were reasons to deny class certification. But if we look at damages, then there's really reasons.

But I don't need to go there because -- I went there for other reasons, in light of Dukes. That's where -- the Dukes and Comcast must be read together. And, again, from our standpoint it's really -- it's just -- you know, class actions are applicable in situations where somebody can testify: This is what happened to me. And we can have certainty based on proofs in the record that that is something that happened to

the class as well. And I think that the Dukes and the Comcast case have clarified that you have to be really, really careful before you make that judgment. Because when you make that judgment you take away the right, you take away Duane Reade's right in this case, whether it be on an individual, to say that you were properly classified. You work in XYZ store. You supervise X number of employees. You hired ABC. You did this. You participated in this budget. You know that's different from the guy who worked up the street, you know, but we're entitled to make the same defenses. They're affirmative defenses. The application of the exemptions are affirmative defenses. An employer has a burden. But a employer has -- it's a burden but it's also a right. It's a right to make those defenses. And you can't take away that right unless there is something that tells you that it's unnecessary. It's irrelevant. It's unneeded in an individual case. And the instant cases, the perfect example where it's not, it's necessary. If you tell me that I can't question all of these assistant managers about their own individual experiences both from a merits standpoint and from a damages standpoint, you are taking away a right from me. And the Supreme Court has clarified that before you do that you have to be very sure that there are common types of proofs; that, yes, we're taking away that right but we can because it's irrelevant, because it's unnecessary.

THE COURT: Just to clarify. This issue is about the Rule 23 certification of the state law claims, right, and the issue of the FLSA collective action is not at issue on this motion; is that correct?

MR. BENSON: Not on this motion, your Honor. You'll be getting that.

THE COURT: Right.

MR. BENSON: At some point.

But yes, this is the Rule 23 context.

So in closing, again, you know we think that the Court is clear that, and cautious, that says before you do that, Court, closely scrutinize the record. Make sure that when you're taking away a defendant's right to defend itself on an individual basis that you're doing so for a really good reason. No such reasons exist in this case and we think that --

THE COURT: One last question for you, sir, and that is I assume -- well let me ask.

Do you have any -- what's your argument about a bifurcated approach that would bifurcate damages from liability?

MR. BENSON: Well, again, you take away my right -- when you certify a class you take away my right on the merits to defend myself on an individual basis. You're saying that there is some common proof, there's something out there that takes away that right. And from my perspective that's where

Dukes come in. Dukes and now -- I don't even think the plaintiff is arguing that Dukes doesn't apply in a wage-an-hour context. It was unclear for a while and your Honor distinguished it in footnote one of your decision here, but it's clear that it applies. And just like we have that right in Comcast, Dukes also gives us that right in the context of the 23(a) analysis. And, again, you can't separate it because in the end of the day if you're ultimately going to determine my liability based on representative proof, which is what ultimately happens in a class action, you've got to make sure that it's for the same reason.

THE COURT: Okay. Thank you, Mr. Benson.

Did you reply to anything?

MR. KLEIN: Just 20 seconds.

Your Honor in the lengthy first decision Mr. Benson is correct that Judge Baer denied a motion for class certification. Subsequently, however, the judge granted our unopposed motion for a 1292 interlocutory appeal to the Second Circuit on that decision. And that's now -- our petition to the Second Circuit is pending on the order of certification.

The other point is a lot of what Mr. Benson is arguing is essentially already decided. I understood this reargument to be focused on Comcast. I'm happy to answer any questions that the Court has. But on Comcast, on the Comcast issue I think we're satisfied.

THE COURT: Okay. Great. Thank you all very much. I'm going to excuse you all and hear from the Right Aid folks.

MR. KLEIN: Your Honor would you like us to remain or are we --

THE COURT: You don't need to. Totally up to you.

MR. KLEIN: Thank you.

(Adjourned)